91-957

No.

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1991

ABELARDO BAEZ and ANGEL BAEZ, ET AT.,

Petitioners,

v.

WELLS FARGO ARMORED SERVICE CORP.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER DURING THE RELEVANT PERIOD, THE PETITIONER EMPLOYEES WERE EXEMPT FROM THE FAIR LABOR STANDARDS ACT'S ("FLSA") OVERTIME PROVISIONS OF 29 U.S.C.A.§ 207 (a)(1), DUE TO THE APPLICATION OF 29 U.S.C.A § 213(b)(1), WHICH EXEMPTS CERTAIN EMPLOYEES FROM OVERTIME.

A. Whether the court below failed to apply the proper standard in the construction and interpretation of FLSA and its exemption in question.

B. Whether the employer met its burden of proof that the Petitioners were exempt from the overtime provisions of FLSA.

II.

WHETHER THE PETITIONERS WERE EMPLOYEES WHOSE JOB DUTIES WERE SUBJECT TO THE SECRETARY OF TRANSPORTATION'S JURISDICTION.

A. Whether the meaning of "interstate commerce" is distinct and different within the FLSA and the Motor Carrier Act ("MCA").

B. Whether the Petitioners were engaged in activities of a character directly affecting the safety of the employer's motor vehicles in the transportation of property in interstate commerce within the meaning of the MCA, 29 C.F.R. § 782.2(a).

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TO the Honorable William H. Rehnquist, Chief Justice, and Associate Justices, Supreme Court of the United States:

Petitioners, ABELARDO BAEZ; ANGEL BAEZ; CARLOS DIAZ, LEONIDES PALACIOS; ALBERTO AMIGO; CARLOS HUMBERTO GARCILAZO; ALEX VILLASUZO; JORGE REYES; and DARYL MAPLE, pray that this court issue a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals entered into the above entitled case on August 9, 1991.

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals reported at case, 30 WH Cases 778, (11th Cir. 1991), is printed in Appendix A ("App. A") hereto, infra. pages 1-11. The Order Granting Cross Motion for Summary Judgment and Summary Judgment of the U.S. District Court for the Southern District of Florida, Miami Division, is printed in App. A, pages 12-20.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals (App. A, pages 1-11) was entered on August 9, 1991. The jurisdiction of the Supreme Court is invoked under the provisions of Title 28 United States Code, § 1651(a) to review the judgment which affirmed the District Court's granting of Cross Summary Judgment dated July 31, 1990, finding that the Petitioner Employees were exempt from the overtime provisions of the Fair Labor Standards Act, and thus were not due overtime wages by the Employer, WELLS FARGO. Petition for writ of certiorari was due on November 9, 1991. Application for extension of time within which to file this petition was presented to Justice Kennedy, who on November 5, 1991, signed an order extending the time to and including November 23, 1991. (App.A, page 21).

STATUTES INVOLVED

This case involves two federal statutes, their respective regulations, and the proper interpretation, construction and application of each; namely, the Fair Labor Standards Act ("FLSA") and the Motor Carrier Act ("MCA"). The following are the two federal statutes and regulations involved in the merits of the case:

I. FLSA of 1938, As Amended:

A.) Section 207(a)(1), FLSA, Overtime Provision:

> No employer shall employ any of his employees...for a workweek longer than forty hours, unless such employee receives compensation for this employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

B. Section 213(b)(1), FLSA, Exemption Provision:

> b) The provisions of section 207 [maximum hours] of this Title shall not apply with respect to--

1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49 [The Motor Carriers Act, 49 U.S.C. §3102].

II. MCA, 49 U.S.C.A.§ 3102:

A. Section 3102(a)(3):

[E]stablish for private carriers by motor vehicles, if need therefore is found, reasonable requirements to promote safety of operations, and to that end, prescribe qualifications and maximum hours of service of employees, and standards of equipment... [Emphasis supplied].

B. Section 10521:

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both, are transported by motor carrier-

(1) between a place in-(A) a State and a place in another State; (B) a State and another

place in the same State through another State; ...

C. Section 10525, MCA:

Exempt Motor Carrier Transportation Entirely in One State:

(a) The ICC shall exempt transportation of a motor carrier subject to the jurisdiction of the Commission under this subchapter from compliance with this subtitle when--

(1) the motor carrier provides transportation entirely in one State; and,

(2) the Commission finds that the nature of quantity of transportation provided by the motor carrier does not substantially affect or impair uniform regulation by the Commission of motor carrier transportation in carrying out the transportation policy of Section 10101 of this title.

III. Section 782.2 (a), 29 CFR Ch V (7-1-90 Edition) of the Wage and Hour Division of Labor:

"Requirements of exemptions in general:"

(a) The exemption of an employee from the hours provisions of the Fair Labor Standards Act under

section 13(b)(1) depends both on the class to which his employer belongs and on the class of work involved in the employee's job. The power of the Secretary of Transportation to establish maximum hours and qualifications of service of employees, on which exemption depends, extends to those classes of employees and those only who: (1) Are employed by carriers whose transportation of passengers or property by motor vehicle is subject to his jurisdiction under section 204 of the Motor Carrier Act (Boutell v. Walling, 327 U.S. 463; Walling v. Casale, 51 F.Supp. 520; and see Ex parte Nos. MC-2 and MC-3, the. the Matter of Maximum Hours of Service of Motor Carrier Employees, 38 M.C.C. 125, 132), and (2) engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers of property in interstate or foreign commerce within the meaning of the Motor Carrier Act. United States v. American Trucking Assns., 310 U.S. 534; Levinson v. Spector Motor Service, 330 U.S. 649; Ex parte No. MC-28, 13 M.C.C. 481; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125; Walling v. Comet Carriers, 151 F.(2d) 107 (C.A. 2).

STATEMENT OF THE CASE

On August 29, 1988, Petitioner employees, ABELARDO BAEZ and ANGEL BAEZ, former employees of Employer, WELLS FARGO, filed a complaint in the United States District Court of Florida, Southern District, claiming overtime wages, and alleging that WELLS FARGO violated the overtime provisions of FLSA. Subsequently, six other former employees of WELLS FARGO filed complaints based on the same issue under the representation of different counsel. Later Petitioner, former employee, DARYL MAPLE, also filed his suit against WELLS FARGO based on the same issue--the refusal to pay him overtime wages. All nine complaints were consolidated by the district court pursuant to Rule 42, Fed.R.Civ.P., on the basis that they involved a common question of law and facts.

WELLS FARGO filed a notice in each of the higher numbered cases, adopting and relying upon the Cross-Motion for Summary Final Judgment, supporting affidavits, statements of undisputed facts, and supporting memorandum of law, which were filed in the lower numbered case (ABELARDO BAEZ and ANGEL BAEZ).

For the purpose of issuance of summary judgment and in order to streamline the litigation process, all the named parties stipulated to the following pertinent facts:

> 1. Defendant, WELLS FARGO ARMORED SERVICE CORP. is a Delaware corporation doing business in the State of Florida, and is a subsidiary of BAKERS INDUSTRIES, INC. The Defendant corporation has a branch office located at 1089 N.W. 20th Street, Miami, Florida.
>
> 2. The Defendant was issued permit No. MC-35807, by the Interstate Commerce Commission on or about January 26, 1982, at its Atlanta Georgia offices. [Footnote 1: The permit's status and validity is not being stipulated to by the Plaintiffs.]

3. The parties stipulate that the Defendant is engaged in "interstate commerce" within the meaning of the Fair Labor Standards Act, but the Plaintiffs dispute that Defendant is engaged in "interstate commerce" pursuant to the jurisdiction of the Motor Carrier's Act for purposes of the exemption provided by §13(b)(2) of the FLSA, 29 U.S.C. §213(b)(1).

4. Defendant, engages and engaged in during the relevant time period, in the security armored truck pick up and delivery services of money, checks [including out-of-State checks], mail, and other valuables to and from service banks, and commercial establishments including the Federal Reserve Bank, and commercial establishments, as well as from the United States Postal Service and United Parcel Services within Miami, Dade County, Florida. [Footnote 2: The Plaintiffs' affidavits, which are attached to their Motion for Summary Judgment, generally detail the Plaintiffs' duties. ANGEL, on occasion did have assignments to the Federal Reserve Bank.]

5. During the relevant period of time, the Plaintiffs performed their duties as Guards and/or Messenger Guards for the Defendant. In that capacity, Plaintiff ANGEL's work included working on Defendant's armored

trucks making pickups and deliveries to commercial banks and various commercial establishments, and on occasion, had assignments to the Federal Reserve Bank and to the United States Postal Services, within Miami Dade County Florida.

6. Plaintiff, ABELARDO's work included routes to Metro Dade County Buses (MTA Bus Central); United Parcel Service; and U.S. Postal Service, and on special occasion to a commercial bank. ABELARDO performed as Guard, Messenger-Guard; and for not more than 40 minutes per day during his last year, drove one of Defendant's trucks from the main branch to another branch for loading for his day's assignments.

7. The Defendant has separate individual contacts for defined customer routes, with each of its customer banks and commercial establishments, Federal Reserve, United Postal Service and United Parcel Service.

8. Out-of-State checks were delivered to banks by the armored trucks on which the Plaintiffs rode, and were for subsequent out-of State transmittal by transporters other than the Defendant. Similarly, some of the defendant's (Miami branch) trucks, some of which the Plaintiffs may have ridden on, transported money to banks for

subsequent out-of-State transmittal, by transporters other than the Defendant.

9. During the relevant period of time, the Plaintiffs were required and did maintain a valid Florida chauffeur's license, underwent physical examination and took the road test for drivers. These requirements meet some of the Department of Transportation's regulations.

10. Commencing on October 1, 1984, through their respective last dates of employment with the Defendant, the Plaintiffs, consistently worked in excess of 40 hours per week, but were paid at a straight hourly rate and not at the overtime rate of one and one-half times the regular rate to which the Plaintiffs claim they are entitled under the Fair Labor Standards Act.

11. While employed by the Defendant, and during the course of their employment, the Plaintiffs' pickup and delivery routes were within a thirty-five (35) miles radius from the Defendant's Miami main branch which is located on 1089 N.W. 20th Street, Miami, Florida. Plaintiffs never rode, traveled, or worked in the Defendant's armored vehicles outside the State of Florida.

REASONS FOR GRANTING WRIT

I.

CERTIORARI SHOULD BE GRANTED IN ORDER TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS

This Petition for a Writ of Certiorari is necessary in order to have this Court at its discretion, consider an important question of apparent conflict in the interpretation and application of two (2) federal laws, the Fair Labor Standards Act and the Motor Carrier Act, and their respective rules and regulations emanating therefrom, as they relate to whether employees who work in armored vehicles and engaged solely in intrastate transportation, are exempt from overtime wages provided by the Fair Labor Standards Act. Only this Court can correct any improper administration and enforcement or lack of enforcement of the Acts in order to prevent the erosion by a narrow and niggardly

construction of FLSA by evaluating the purposes of both Acts and the reasons for their creation. This Honorable Court has an obligation to correct instances of improper administration of FLSA. Roger v. Missouri Pacific R. Co., 352 U.S. 500, 524, 559, 77 S.Ct. 443, 457, & 478, (1957).

Furthermore, there is an urgent need for a uniform rule and for a consistent interpretation, construction and application of the FLSA and the MCA by the Circuit Courts. The Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits, as well as several District Courts, more specified below, are in conflict with regard to who is covered and who is exempt from the overtime provisions of FLSA. See differing and inconsistent opinions concerning the interpretation, application, and interrelation of the FLSA and the MCA. For example, see Opelika Royal Crown Btlg. Co.

v. Golberg, 299 F.2d 37 (5th Cir. 1962);[1] but, see Wirtz v. Tyler Pipe & Foundry, Co., 369 F.2d 927 (5th Cir. 1966); Baird v. Wagoner Transportation; 425 F.2d 407 (5th Cir. 1970) cert.den., 400 U.S.829, 91 S.Ct. 58, 27 L.Ed.2d 59 (1970); Coleman v. Jiffy June Farms, 324 F.Supp. 664 (S.D. Ala. 1970), 456 F.2d 1139 (5th cir. 1971), cert.den., 409 U.S. 948, 93 S.Ct. 292, 34 L.2d. 2219 (1972); Golberg v. Faber Industries, Inc., 291 F.2d 232 (7th Cir. 1961); Haber v. Americana Corp. 378 F.2d 864 (9th Cir. 1967); and Frito Lay, Inc., v. Wisc. Labor & Industry Review Comm., 95 Wis.2d 395, 290 N.W.2d 551, 303 N.W.2d 668, cert.den. 454 U.S. 884, 102 S.Ct. 376 (1981).

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[1] The below district and circuit courts relied heavily on the Opelika decision, for their conclusion that Petitioner Employees were exempt from the overtime provisions of the FLSA.

The fact that Appellants and other similarly situated armored car service employees are being exploited by requiring them to work excessive hours over forty-hours per week, yet denying them overtime wages through the guise of being exempt because they supposedly fall within the regulatory power of the Secretary of Transportation, justifies this Honorable Court to exercise its discretionary power of granting a writ of certiorari. It is imperative that the existing confusion as to whether Petitioners and other similarly situated employees fall within the exemption of § 213(b)(1) of the FLSA be resolved by this Court.

WELLS FARGO paid its armored truck employees the overtime wages until late 1984, and a large number of similarly situated employees who work for other armored car service employers in this and other judicial jurisdictions throughout this

nation receive overtime wages, including some in Dade County Florida who were receiving overtime wages until 1988.[2]

An important question which should be resolved by this Court is whether the Southern District Court of Florida and the Eleventh Circuit Court of Appeals correctly interpreted and applied the respective provisions applicable in this case. The Petitioners submit that the court below failed to apply the proper standard of review in interpreting the FLSA, by not applying the two-tier test; the broad

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[2] Several employees of Brinks Incorporated of Florida, Armored Car Service Division in Miami, have engaged the services of undersigned counsel because they, as armored vehicle employees were paid overtime until February 1988 at which time Brinks discontinued paying them the overtime wages although they continued to work as many as 30 hours per week overtime. Affidavits from employees assert that officials of Brinks have confirmed to them that out of two hundred and forty (240) locations of Brinks throughout the nation only three (3) locations do not pay overtime to its employees, one of which is in Miami.

interpretation of the FLSA and the narrow and strict construction of its exemptions. Furthermore, they submit that the court below failed to apply the proper interpretation and application of "interstate commerce" within the meaning of each respective Act, the FLSA and the MCA. Additionally, Petitioners submit that the court below failed to properly consider the requirements of 29 C.F.R. § 782.7, Interstate Commerce Commission's ("ICC") for exemption from the MCA, which they submit exempted them from the "power" of the Secretary of Transportation, and therefore made them eligible for overtime wages under the FLSA. Petitioners assert that they were not within the jurisdiction of the MCA, when in fact the armored vehicles which they rode did not travel outside a thirty-five (35) mile radius from the employer's main center, nor did the vehicles ever cross state lines. Moreover, crucial to the merits of this

cause is whether the Petitioners engaged in activities of a character directly affecting the safety of WELLS FARGO's motor vehicles in the transportation of such property and valuable in interstate or foreign commerce within the meaning of MCA. 29 C.F.R. § 782.7. Furthermore, an overall important factor for this Court to review is whether WELLS FARGO met its burden of proof that the Petitioners were exempt from the overtime provisions of the FLSA. Idaho Sheet Metal Works, Inc., v. Wirtz, 383 U.S. 190, 208, 86 S.Ct. 737, 748, 15 L.Ed.2d 694 (1966).

Petitioners submit that this is the first case of this sort concerning the aforementioned specific issues which affect a large number of laboring men and women. This Court has previously addressed the issue of overtime and other exemptions from overtime, but not as to armored car employees who do work only on intracity

routes. Certiorari should be granted where a clash of opinions in the courts of appeals in applying different rules to the same federal wage and hour law requires settlement of a question by this Court. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, (1951).

II.

SUMMARY OF ARGUMENT

The Petitioners submit that they are due overtime benefits pursuant to the provisions of the Fair Labor Standards Act, 29 U.S.C.§ 7(a), since they are not employees exempted pursuant to 29 U.S.C. §213(b)(1). In order for § 213(b)(1), the MCA exemption, to apply, the employer must prove that 1) its employees, the Petitioners, were employees whose job duties were subject to the Secretary of Transportation's jurisdiction, and thus were within the Secretary's "power;" and, 2)

that they engaged in activities of a character directly affecting the safety of the employer's motor vehicle in the transportation of property in interstate or foreign commerce, within the meaning of the MCA, 29 C.F.R. § 782.2(a).

The District and the Eleventh Circuit courts accepted WELLS FARGO's two major arguments claiming that it is exempt from the provisions of overtime of the FLSA; namely, because: 1) it is a carrier subject to the Secretary of Transportation's jurisdiction and power; and 2) as a "contract carrier," under the MCA, the Petitioners' activities directly affected the safety of motor vehicles in the transportation of property in interstate commerce pursuant to MCA.

Petitioners submit that the Eleventh Circuit's reliance on this Court's holdings in Levinson v. Spector Motor Service, 303

U.S. 534, 60 S.Ct. 1059, 91 L.Ed. 1158 (1947) and United States v. American Trucking Ass'n., 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940), is appropriate, since basically those cases address the criteria to be utilized in order to establish whether an employee falls within the power of the Secretary of Transportation. The court relied on Levinson for its holding that:

> The Secretary has the power to establish qualifications and maximum hours of service for employees who (1) are employed by carriers whose transportation of passengers of property by motor vehicle is subject to the Secretary's jurisdiction under the Motor Carrier Act; and 2) are engaged in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act.

This Court in United States v. American Trucking Ass'n., supra., held:

> There is no more persuasive evidence of the purpose of a statute than the words used by the legislature, and plain meaning of such words may be followed when they are sufficient in and of themselves to determine the purpose, but court may look beyond such words to the purpose when the plain meaning leads to absurd or futile results, or an unreasonable result plainly at variance with policy of the legislature as a whole. 310 U.S. at 543. [Emphasis supplied].

Petitioners assert that WELLS FARGO did not meet its burden of proof that their job duties, primarily as Guards and Messenger-Guards on armored vehicles, were subject to the Secretary of Transportation's jurisdiction, and or "power," or, that their activities directly affected the safety of the employer's motor vehicles in the transportation of property in interstate commerce within the meaning of the Motor Carrier Act. In June, 1990, the District Court in Idaho addressed the issue of preclusion of concurrent jurisdiction and whether the exemption applied to the

employer or to the employee. Dole v. Circle "A" Const. Inc., 738 F.Supp. 1313 (D.Idaho 1990). Circle "A" attempted to exempt all of its drivers and mechanics from the overtime provisions of the FLSA under MCA, and emphasized that:

> [I]t is not necessary for the Secretary of Transportation to have actually established qualifications and maximum hours of service for the 13(b)(1) exemption to apply, but...the mere existence of [her] power to do so is sufficient.

The court held that the fact that some employees were subject to the Department of Transportation regulations did not exempt the employer from complying with the overtime wage provisions of FLSA with regard to all its employees. Dole v. Circle A., supra. Also, see, McLaughlin v. Brennan, 700 F.Supp. 272 (W.D. Pa. 1988).

The employer cites Morris v. McComb,

322 U.S. 422 (1947),[3] for its position that the Court exempted two drivers of a common carrier despite the fact that these drivers did not perform any work in interstate commerce. [Brief Appellee, p. 22]. The Petitioners also cite Morris v. McComb, for its opinion that "it may well be presumed that Congress had in mind dual regulation in substance, and not merely in form, and that in speaking of employees with respect to whom the ICC has power, Congress meant to exempt only those whose activities as such employees, occupied at least a substantial portion of the workweek by which the application of 29 U.S.C. § 7, FLSA, and the exemption therefrom must be measured." Id. at 425.

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[3] This United States Supreme Court Decision was a split decision, five (5) to four (4), with three Justices joining in the dissent.

The Honorable United States Justices, Murphy, Black, and Douglas opined in their dissent in Morris v. McComb, supra.:

> ...We are dealing here with a statute that is dedicated to the proposition that laboring men are to be treated as something more than chattels. And their statutory rights are not to be discarded by adherence to formalistic dogmas of interpretations. Section 13(b)(1) is not just an exercise in grammar. It is part of the living fiber embodying the rights of those who labor for others. It must be read and interpreted in the light of reason and in the light of the aims which Congress sought to achieve. Id. at 428.[Emphasis supplied].

These distinguished Supreme Court Justices further noted:

> ...interpreting § 13(b)(1) in disregard of reality only acts as an open invitation to evade the Act, and to destroy the statutory rights of those trucking concern employees who now perform no activities which affect the safety of operations. All that the employer need to do to withdraw the benefits of the Act [FLSA], from these employees is to send them occasionally to a terminal to pick up or deliver a piece of interstate freight. They then fall into the 'power'

> of the ICC and automatically lose their rights under the FLSA. [Emphasis supplied].

The Sixth Circuit in Baird v. Wagoner Transportation, supra., held that a mere possession of a dormant interstate certificate did not give ICC "power" over the company's employees exempting them from FLSA. Id. at 408. The Ninth Circuit held in Marshall v. Union Pacific Motor Freight, 650 F.2d 1085, (9th Cir. 1981) that dispatchers of a motor carrier performing certain limited inspection and enforcement duties were not exempt from the overtime provisions of the FLSA.

Only this Honorable Court, the supreme law of the land, can resolve the inconsistency of interpretation and application of the FLSA and the MCA. The intent of Congress in legislating the Motor Carrier Act was to create a uniform safety program in interstate and foreign commerce,

and the restriction of the number of hours which employees could work in any one workweek was a major part of the safety program in order for trucking concerned employees to avoid fatigue which would be conducive to accidents endangering the lives of the employees and that of the public. Accordingly, in its creation of the MCA, the legislature was concerned about subject employees working too many hours, and its aim was to restrict those hours.

The Transportation (Supp. Pamphlet Services, 1988), Congressional Statement of Purpose, 49 U.S.C.A. § 2501: specifies:

> The purposes of this chapter are to promote the safe operation of commercial motor vehicles and other employees whose employment directly affects motor carrier safety, and to assure increased compliance with traffic laws and with common motor vehicle safety and health rules, regulations, standards, and orders issued pursuant to this Act. (Pub. L. 98-554, Title II, 202, Oct. 30, 1984, 98 Stat. 2832).

It is Petitioners' position that the interpretation and application of the FLSA and the MCA is being inconsistently applied and enforced; is confusing; and is in urgent need of review and clarification by the highest court in this nation, this Honorable Court. The simultaneous application of contradictory standards by the courts below leads to anomalous results. The Eleventh Circuit applied a ruling contrary to that of other courts which have passed upon similar matters, therefore there is a need for a uniform rule. Accordingly, the granting of certiorari is appropriate. Commissioner of I.R.S. v. Bilder, 369 U.S. 499, 82 S.Ct. 881, 8 L.Ed.2d 65 (1962).

A major task for this Honorable Court to undertake is to grant the writ in order to address and distinguish the two federal Acts, FLSA and MCA, which are related, but separate and distinct, and each created by

Congress based on different goals and purposes. The purpose of the requirement of § 7(a) of FLSA that overtime be paid at the rate of one and one-half times the regular rate is "to compensate those who labor in excess of the statutory minimum number of hours for the wear and tear of extra work, as well as to spread employment through inducing employers to shorten hours because of the pressure of extra cost." Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460, 68 S.Ct. 1186,1194, 92 L.Ed. 1502 (1948).

A. BOTH, BROAD AND NARROW CONSTRUCTION REQUIRED FOR REVIEW OF FLSA

At the outset, this Court must determine the standards which are applicable to the interpretation of the FLSA and the MCA. Courts have consistently held that there are two standards for interpreting FLSA, one for coverage under the Act, which is to be broadly and liberally construed;

and the other, for the exemptions under FLSA, which is to be narrowly construed and strictly applied. To ensure maximum coverage by FLSA, a section exemption is to be construed narrowly against the employer asserting it. Arnold v. Ben Kanowsky, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed 2d. 393 (1960). Exceptions and exemptions to coverage under FLSA should be construed narrowly against those seeking to avoid liability against them for payment of overtime compensation. Dole v. Circle A, supra.; International Assn'n of Firefighters v. Rome, Ga., 682 F.Supp. 522 (N.D. Ga. 1988). It is also well settled that an employer bears the burden of proving entitlement to an exemption. Id. at 394. Also see Brock v. Norman Country Market, Inc., 835 F.2d 823, 827 (11th Cir. 1988), cert. den. 487 U.S. 1205, 108 S.Ct. 2845 (1988).

B. DISTINCT MEANINGS OF "INTERSTATE COMMERCE" WITHIN FLSA AND MCA

Petitioners submit that in light of the United States' pending and ongoing negotiations of free trade agreements with other countries, specifically with Canada and Mexico, these two very important federal laws concerning commerce and transportation within our borders should be revisited by this Honorable Court in order to clarify and resolve any ambiguities and present inconsistencies of application by the different circuits and district courts and the different employers of similarly trucking service providers, depending on their geographical location, and whether they are engaged in intrastate or interstate transportation.

In 1962, the Fifth Circuit addressed the meaning of "interstate commerce" for the purposes of jurisdiction pursuant to FLSA in Opelika, supra. It referred to this Court's

decision in Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460 (1943), for its dicta that:

> [I]t is clear that the purpose of the ACT [FLSA] was to extend federal control in this field throughout the fartherest reaches of the channels of interstate commerce." Id. 299 at 40.

Plaintiffs submit that in reviewing FLSA for its first broad applicability, the first determination should be whether the employer and its employees fall within its jurisdiction for the purpose of regulating and protecting employees with respect to wages and hours. Once, having given this broad interpretation of the FLSA in general for coverability of employees, the second step is to determine whether certain employees due to their activities and duties, fall within the power of the Secretary of Transportation to control. If they do not, then the employees are not exempt from the protection of the FLSA as to

wages and hours, including overtime. Dole v. Circle "A" Const. Inc., supra.

In the stipulation by the Petitioners and WELLS FARGO for purposes of summary judgment, both employees and employer agree that WELLS FARGO is an employer within the meaning of "interstate commerce" for purposes of FLSA, but Petitioners dispute that WELLS FARGO, in this instance, is engaged in "interstate commerce" within the jurisdiction of the Motor Carrier Act for purposes of the exemption provided by 29 U.S.C. § 213(b)(1).

The Sixth Circuit in Baird v. Wagoner, supra., eight years after Opelika, referring to ICC's Ex Parte No. MC-48, 71 MCC 17 (1957), held that even "truck drivers" who were not engaged in "interstate commerce" under MCA, did not come under the jurisdiction of the ICC, where the following three factors were present:

1) specific orders of a specific quantity are not moved from one state through the terminal storage of a second state to a specific customer;

2) the use of the terminal storage as a "local marketing facility" from which products are sold or allocated; and

3) transportation in the furtherance of such distribution within a single state is specifically arranged only after sale or allocation from storage.

The Eastern District Court of Pennsylvania held that employees of private carriers who are engaged in "intrastate," as opposed to "interstate," commerce are not exempted from the overtime provisions of the FLSA, and cites Baird, supra. Dole v. Solid Waste Services Inc., 733 F.Supp. 895, 929 (E.D. Pa. 1989). The Opelika court held that for purposes of coverage by FLSA, both, warehouseman and driver helpers were covered by the Act, but arrived at two different conclusions when it determined whether they were exempt pursuant to MCA

jurisdiction. It determined that the warehouseman was not exempt from the overtime benefits of the FLSA, but that the route driver helpers' duties affected the safety of operation of vehicles, and thus were exempt from the overtime provisions of FLSA. One of the reasons the court in Opelika considered that the driver-helpers were exempt from FLSA and covered by the MCA was a 1941 ICC interpretation which determined that it had authority over "helpers," other than drivers who rode on vehicles under ICC jurisdiction, it stated:

> The primary employees whom the Commission had in mind were those who accompanied the driver on over-the-road trips and helped to relieve the driver to place flares, to change tires, etc. [Emphasis supplied].

However, Petitioners submit that the Fifth Circuit misapplied the above I.C.C. ruling, since it referred to "helpers" who accompanied drivers on "over-the-road-

trips," which definition is "one who operates a truck over long distance trips, and is relieved by another "over the road driver" during the trip. Spohn v. Industrial Commission, 32 NE 2d 554, 558 (Ohio 1941). Over-the-road-drivers and their helpers have traditionally been exempt from the overtime provisions of FLSA, because they were the reason that the Motor Carrier Act was created for the safety operation of motor carriers in interstate transportation. Petitioners herein, were not "route helpers" of drivers, they were Guards, Messenger-Guards, or Driver-Guards who rode on intracity routes and whose primary, if not sole purpose, was to guard the valuables being transported therein. The test is not what employees are called, but what they actually do. Haber v. Americana Corp., 378 F.2d 854 (9th Cir. 1967).

The Eleventh Circuit cites Brennan v. Schwerman Trucking Company of Virginia, Inc., 540 F.2d 1200 (4th Cir. 1976), for its holding that WELLS FARGO is subject to the Secretary of Transportation's jurisdiction because it holds a permit from the ICC. The facts between Schwerman, supra., and this case are very distinct. Schwerman was a motor carrier of hazardous materials and not only obtained an ICC permit for all of its trucks, but the Certificate of Public Convenience authorized him to engage in interstate or foreign commerce from points in Virginia to points in North Carolina, West Virginia, District of Columbia, Delaware, Maryland, Georgia, South Carolina and Tennessee. Id. at 1202. In any event, Petitioners submit that they are neither Drivers nor Mechanics, but Messenger-Guards, and Guards, and to some extent, at least two may have been driver-guards for a minimum of

time during their assignment. In addition, in 1988, the District Court of Pennsylvania in McLaughlin v. Brennan, supra. at 274, distinguished Schwerman, and held:

> We find this irrelevant to the question of whether they qualify as a "motor contract carrier." The "holding out" concept does not apply to "contact carriers." ...Defendants must actually perform the kind of transportation specified in the definition of "motor contact carrier," before they can attain that status. Brock v. Pacific Vacuum Truck Co., 27 WH cases 1617, 1623 (C.D. CA. 1987)[1987 WL 13666].

The FLSA represents remedial legislation encompassing the goals of guaranteeing adequate compensation to the nation's workforce. The I.C.C. has recognized this fact in its implementation of the Motor Carrier Act, and has undertaken the authority under that Act [MCA] in a narrow manner. In evaluating the reach of the MCA, the ICC has determined that the legislative history of the MCA "discloses a

clear intent of Congress, that regulations by the ICC with respect to qualifications and maximum hours of service should be on the basis of safety of operation of motor vehicles on the highways of the country, and that alone. " Ex Parte No. MCC 2, 28 M.C.C. 125, 129 (1941). Ott v. The Youngstown Cartage Co, 26 WH Cases 966 (N.D. Ohio, 1984).

Accordingly, Petitioners submit that the Department of Transportation did not, and does not have the power to regulate over Petitioners and WELLS FARGO Miami's similarly situated armored car employees, and therefore, were and are within the protective overtime wage provisions of FLSA.

C. THE VIOLATION OF THE OVERTIME PROVISIONS OF FLSA WAS WILLFUL.

In accordance with the standard as enunciated by this Honorable Court in its holding in McLaughlin v. Richland Shoe Company, 486 U.S.128, 108 S.Ct. 1677, 100

L.Ed. 115 (1988), Petitioners assert that WELLS FARGO's violation of the overtime provisions of the FLSA was "willful." They submit that the employer knew that it was violating FLSA, because up through September 1984, it was paying its armored car employees overtime wages, but discontinued doing so on October 1, 1984, demonstrating reckless disregard by refusing to pay the overtime wages, since there was no reason for the employer to believe that the FLSA was no longer applicable to the Petitioners. Any employer who violates the provisions of §7 of FLSA is liable to the employees affected in the amount of their unpaid overtime compensation, and in an additional equal amount as liquidated damages, plus costs of the action and a reasonable attorney fee to be paid by the employer. Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460, 68 S.Ct. 1186, 1194, (1948).

CONCLUSION

Based on the foregoing argument and citations of law, Petitioners respectfully request that this Honorable Court grant their Petition for a writ of certiorari.

Dated: November 22, 1991

Respectfully submitted,

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APPENDIX

Abelardo BAEZ, Angel BAEZ,
Plaintiffs-Appellants,
v.

WELLS FARGO ARMORED SERVICE CORP., a corp. doing business in the State of Florida,
Defendant-Appellee.

No. 90-5738
Unites States Court of Appeals,
Eleventh Circuit.

August 9, 1991

Driver guards, messenger guards, and guards for security armored truck pickup and delivery service filed suit alleging that employer's failure to pay them overtime compensation during certain periods of their employment violated Fair Labor Standards Act (FLSA). The United States District Court for the Southern District of Florida, No. 88-1602-CIV-JWK, James W. Kehoe, J., granted summary judgment in employer's favor. On appeal, the Court of Appeals held that guards were exempt from overtime compensation, as employer was "contract carrier" subject to the jurisdiction of

Secretary of Transportation under Motor Carrier Act and guards were engaged in activities of character directly affecting safety of operation of motor vehicles in interstate commerce within meaning of Motor Carrier Act even though their vehicles did not cross state lines, as transported checks and other instruments were bound for banks outside the state.

Affirmed.

Labor Relations 1241,1243

Driver guards, messenger guards, and guards for security armored truck pickup and delivery service were exempt from overtime provisions of Fair Labor Standards Act (FLSA); guards' employer was "contract carrier" subject to jurisdiction of Secretary of Transportation under Motor Carrier Act, and guards were engaged in activity of character directly affecting safety of operation of motor vehicles in

interstate commerce within meaning of Motor Carrier Act even thought the vehicles did not cross state lines, as transported checks and other instruments were bound for banks outside of state. Fair Labor Standards Act of 1938, § 13(b)(1), as amended, 29 U.S.C.A. §213(b)(1); 49 U.S.C.A. § 3102; Interstate Commerce Act, § 204, 49 U.S.C. (1976 Ed.) § 304.

Appeal from the United States District Court for the Southern District of Florida.

Before ANDERSON and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

Appellants in these consolidated cases appeal from the district court's order granting summary judgment in favor appellee Wells Fargo Armored Service

* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Corporation ("Wells Fargo"). Appellants, all former Wells Fargo employees, argue that the district court erred in concluding that appellants were exempt from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. Because we agree with the district court that appellants fall within the exemption of 29 U.S.C. § 213(b)(1), we affirm.

The appellants, whose cases were all consolidated in the district court under Fed.R.Civ.P. 42, filed suit alleging that Wells Fargo failed to pay them overtime compensation during certain periods of their employment in violation of the Fair Labor Standards Act. The facts are not in dispute and were well stated by the court below:

> 1. The Plaintiffs in these consolidated cases were formerly employed by the Defendant primarily as driver-guards, messenger-guards and/or and [sic]

guards, with employment duties that took place within thirty-five miles of Defendant's main branch office in Miami (Dade County) Florida.

2. The Defendant, during the relevant time periods of the Plaintiffs' employment, were engaged in security armored truck pickup and delivery services, involving the pickup and delivery of coins and currency, checks (both in-state and out-of-state checks), mail and other items of value, to and from service banks and commercial establishments, including the Federal Reserve Bank, the United States Postal Service and United Parcel Service, all within the Miami, Florida, area.

3. From October 1, 1984, until the end of their employment with the Defendant, the Plaintiffs consistently worked in

excess of their forty-hour week, and were paid at a straight hourly rate for those excess hours, rather than at one and one-half times the regular rate, an amount to which the Plaintiffs claim entitlement and concerning which these consolidated actions are based.9

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9. Prior to October 1, 1984, the Defendant paid the Plaintiffs for overtime at the higher hourly rate, i.e., one and one-half times the regular rate, but ceased such practice in response to the advise of outside legal counsel, and in reliance upon the subsequent audits of the Wage and Hour Division (United States Department of Labor) accepting the payment of the lower (straight hourly) rate for Plaintiffs' overtime work.

Baez v. Wells Fargo Armored Service Corp. No. 88-1602-Civ-Kehoe (S.D. Fla. July 31, 1990)(order granting summary judgment).

The sole issue in this case is whether appellants are exempt from the overtime provisions of the Fair Labor Standards Act

under 29 U.S.C. § 213(b)(1). Section 213(b)(1) provides that such overtime compensation provisions "shall not apply with respect to...any employee with respect to whom the secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49..."[1] Thus , the question in the instant case is whether the Secretary has the power to regulate with respect to appellants.[2]

The Secretary has the power to establish qualifications and maximum hours

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[1] 49 U.S.C.§ 304, has been replaced by 49 U.S.C. § 3102. Section 3102 is substantially similar to § 304 and does not affect the exemption under 29 U.S.C. §213(b)(1). See Burris v. Bozzay Roadrunner Service, 651 F.Supp. 36 (E.D. MO. 1986).

[2] The operation of the § 213(b)(1) exemption is dependent of whether the Secretary has the power to regulate, not on whether the Secretary has actually exercised such power. Galbreath v. Gulf Oil Corp., 413 F.2d 941, 944 n.4 (4th Cir. 1969); Opelika Royal Crown Bottling Co. v. Goldberg, 299 F.2d 37, 42 (5th Cir. 1962).

of service for employees who (1) are employed by carriers whose transportation of passengers or property by motor vehicle is subject to the Secretary's jurisdiction under the Motor Carrier Act; and (2) engaged in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act. 29 C.F.R.§ 782.2(a) (citing United States v. American Trucking Ass'n, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940); Levinson v. Spector Motor Service, 330 U.S. 649, 67 S.Ct. 931, 91 L.Ed. 1158 (1947).

The parties agree that Wells Fargo, which holds a permit form the interstate Commerce Commission , is a "contract carrier." As such, Wells Fargo is subject to the Secretary's jurisdiction under the

Motor Carrier Act. See 29 § 782.1(b); Brennan v. Schwerman Trucking Co., of Virginia, Inc. 540 F.2d 1200 (4th Cir. 1976); Starrett v. Bruce, 391 F.2d 320 (10th Cir.) cert. denied, 393 U.S. 971, 89 S.Ct. 404, 21 L.Ed.2d 384 (1968). In fact the permit issued by the ICC indicates that jurisdiction has already been exercised. See Brennan, 540 F.2d at 1204. Thus, it is clear that Wells Fargo is a motor carrier subject to the Secretary's jurisdiction.

Appellants argue that they were not engaged in activities of a character directly affecting the safety of operations of motor vehicles in interstate commerce within the meaning of the Motor Carrier Act. Appellants' argument has two prongs: that they were not engaged in interstate commerce because their vehicles did not cross state line, and that their employment did not directly affect the safety of operations of

the vehicle. Appellants' argument is foreclosed by Opelika Royal Crown Bottling Co. v. Goldberg, 299 F.2d. 37 (5th Cir. 1962).[3] In Opelika, our predecessor circuit held that drivers and driver-helpers engaged in intrastate transportation of empty soft drink bottles were exempt from overtime compensation under § 213(b)(1). Although the employees themselves traveled only intrastate, the empty bottles being transported were destined for a bottling plant in the neighboring state. In the instant case, the transported checks and other instruments were bound for banks outside the state of Florida. With regard to the effect on safety aspect. Opelika held that the driver-helpers did satisfy that requirement, relying on an Interstate

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[3] This case was decided prior to the close of business on September 30, 1981, and is binding precedent under Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

Commerce Commission report concluding[4] that "guards on armored bank trucks...performed services which affect the safety of the vehicle." Opelika, 299 F.2d. at 43.

We conclude that Opelika controls the instant case. Accordingly, the judgment of the district court is

AFFIRMED.

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[4] The same conclusion now appears in regulation to which we owe deference, 29 C.F.R. § 782.4. See Levinson v. Spector Motor Service, 330 U.S. 649, 67 S.Ct. 931, 943, 91 L.Ed. 1158 (1947). The regulations also support the interstate commerce aspect of Opelika's holding. See 29 C.F.R. § 782.7.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 88-1602-CIV-KEHOE 1
ABELARDO BAEZ and 89-0080-CIV-KEHOE 2
ANGEL BAEZ, 89-0081-CIV-KEHOE 3
89-0082-CIV-KEHOE 4
Plaintiffs, 89-0083-CIV-KEHOE 5
89-0084-CIV-KEHOE 6
vs. 89-1410-CIV-KEHOE 7

WELLS FARGO ARMORED SERVICE CORPORATION,

Defendant.
_____/

ORDER GRANTING CROSS MOTION
FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon the motion for summary judgment Plaintiffs, Abelardo Baez and Angel Baez (Case No. 88-1602), and upon the cross motion for summary judgment of the Defendant, Wells Fargo Armored Service Corporation.

After a review of the motions, responses and replies, and the various affidavits, exhibits, stipulated facts and

1. Carlos Diaz V. Wells Fargo Serv. Corp.
2. Leonides Palacios v. Wells Fargo Serv. Corp.
3. Alberto Amigo v. Wells Fargo Serv. Corp.
4. Carlos H. Garcilazo v. Wells Fargo Serv. Corp.
6. Alex Villasuzo v. Wells Fargo Serv. Corp.
7. Daryl Maple v. Wells Fargo Serv. Corp.

other attachments, it is

ORDERED AND ADJUDGED that pursuant to the controlling statutory and regulatory provisions applicable to the established facts in these consolidated cases, and the specific interpretations of those provisions, which are binding upon this Court, the Defendant's cross motion for summary judgment is GRANTED and the Plaintiffs' motion for summary judgment is DENIED.

1. The Plaintiffs in these consolidated cases were formerly employed by the Defendant primarily as driver-guards, messenger-guards and/or and guards, with employment duties that took place within thirty-five miles of the Defendant's main branch office in Miami (Dad County), Florida.

2. The Defendant, during the relevant

time periods of the Plaintiffs' employment, was engaged in security armored truck pickup and delivery services, involving the pickup and delivery of coins and currency, checks (both in-state and out-of-state checks), mail and other items of value, to and from service banks and commercial establishments, including the Federal Reserve Bank, the United States Postal Service and the United Parcel Service, all within the Miami, Florida, area.

3. From October 1, 1984, until the end of their employment with the Defendant, the Plaintiffs consistently worked in excess of their forty-hour week, and were paid at a straight hourly rate for those excess hours, rather than at one and one-half times the regular rate, an amount to which the Plaintiffs claim entitlement, and concerning which these consolidated actions are

based.[8]

4. The Defendant has denied the Plaintiffs' claim for such overtime wages on the basis that the Plaintiffs are exempt from such wages pursuant to the overtime provisions of the Fair Labor Standards Act, Title 29, United States Code, Section 213(b)(1) ("Section 13")[9]

5. Thus, the issue before this Court is whether, during the relevant times here in issue and as a consequence of Section 13,

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[8] Prior to October 1, 1984, the Defendant paid the Plaintiffs for overtime at the higher hourly rate, but ceased such practice in response to the advise of outside legal counsel, and in reliance upon the subsequent audits of the Wage and Hour Division (United States Department of Labor) accepting the payment of the lower (straight hourly) rate for Plaintiffs' overtime work.

[9] (b) The provisions of section 207 [Maximum hours] of this title shall not apply with respect to--(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49 [The Motor Carrier Act, 49 USC Section 3102]...

the Plaintiffs were exempt from the Fair Labor Standards Act's overtime provisions.[10]

6. For the Section 13 exemption to apply:

a. the employer must be a carrier whose transportation of property was subject to the jurisdiction of the Secretary of Transportation, and

b. the employees must engage in activities of a character directly affecting the safety of motor vehicles in the transportation of such property in interstate or foreign commerce within the meaning of the Motor Carrier Act.[11]

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[10] See Galbreath v. Gulf Oil Corporation, 413 F.2d 941, 946-47 (5th Cir. 1969), for a discussion of the standard to be applied in construing exemptions under Section 13.

[11] 29 CFR Section 782.2(a)

7. The Plaintiffs were employed by a carrier whose transportation of property was subject to the jurisdiction of the Secretary of Transportation:

a. Pursuant to Section 13, the Secretary of Transportation had the "power" to regulate the Defendant. See Opelika Royal Crown Bottling Company v. Goldberg, 299 F.2d 37, 42 (5th Cir. 1962).

b. The Defendant is a "contract carrier" operating with a permit issued by the Interstate Commerce Commission. See Starrett v. Bruce, 391 F.2d 320 (10th Cir. 1968), for the extent of the Secretary of Transportation's power to regulate such companies, and see 29 C.F.R. Section 782.1(b).

c. There is ample support for the proposition that the Secretary of Transportation has the power to regulate "intrastate" activities and that employees

are exempt under Section 13 even though their work is entirely intrastate. See, e.g., Section 24C10(a) of the Department of Labor, Wage-Hour Field Operations Handbook, and cf. the Opelika Royal Crown Bottling Company case, supra. and the Galbreath case, footnote 11, supra.

d. The nature of the property picked up from, and delivered to, the banks, United States Postal Service and other commercial establishments serviced by the Defendant through the Plaintiffs' employment provides strong support for the proposition that the particular property transported was in "interstate commerce." See paragraph 2, supra.

8. The Plaintiffs engaged in activities of a character directly affecting the safety of motor vehicles in the transportation of

property in interstate commerce.[12] See, e.g., Opelika Royal Crown Bottling Company, supra, at 43. Also, "[i]t is ...the character of the employee's activities rather than the proportion of either his time or his activities that determines the actual need for the Commission's power to establish qualifications and maximum hours of service... As a practical matter it is not the amount of time an employee spends in work affecting safety, rather it is what he may do in the time thus spent, whether it be large or small, that determines the effect on safety." Starrett v. Bruce, supra., at 323.

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[12] See Levinson v. Spector Motor Services, 330 U.S. 649, 673, 67 S.Ct. 931, 91 L.Ed., 1158 (1947), for the proposition that Courts will defer to the Secretary of Transportation's determination of activities which are of a character directly affecting the safety of operation of motor vehicles of property in interstate commerce.

ACCORDINGLY, based on the established facts and the applicable statutes, regulations and case law, the Defendant's cross motion for a summary judgment is hereupon GRANTED. It is

FURTHER ORDERED AND ADJUDGED that a summary judgment is ENTERED herein in favor of the Defendant and against the consolidated Plaintiffs.

DONE AND ORDERED in Chambers at Miami, Florida this 31st day of July, 1990.

JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Edna E. Canino, Esq.,
Joseph Freeman, Esq.,
Alina M. Gonzalez, Esq.,
Sherryl Marten Dunaj, Esq.

SUPREME COURT OF THE UNITED STATES

No. A-322

Abelardo Baez, et. al.,

Petitioners,

v.

Wells Fargo Armored Service Corp.,

Respondent.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 23, 1991.

/a/ Anthony M. Kennedy
Associate Justice of the
Supreme Court of the
United States

Dated this 5th
day of November, 1991.